2013 WL 6847524 (La.App. 4 Cir.) (Appellate Brief)
Court of Appeal of Louisiana, Fourth Circuit.

6126, L.L.C., James P. Farwell, and G. F. Gaylebreton, Plaintiffs-Appellees,
v.
Jon Besthoff STRAUSS, Jeffry B. Strauss, and Susan Marie Carman Strauss, Defendants-Appellants.

No. 2013-CA-0853.
August 26, 2013.

On Appeal From The Civil District Court, Parish Of Orleans, State Of Louisiana Docket No. 2012-04732, Section "7" Division "F" Honorable Christopher J. Bruno, Judge, Presiding
A Civil Proceeding

Reply Brief on the Merits on Behalf of Jon Besthoff Strauss, Jeffry B. Strauss and Susan Marie Carman Strauss

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***2 MAY IT PLEASE THE COURT:**

This reply brief is filed by appellants Mrs. Jon Strauss, Jeffry Strauss and Susan Strauss to address several arguments made in Appellees' Original Brief.

I. The counterletter was not a sale under contract law.

Appellees do not refute the Strausses' argument that the counterletter did not result in a sale to Jeffry under Louisiana contract law. Appellees cite the counterletter's language stating "the rights granted in this counter letter are subject to approval of the owners of the other two units in St. Henry condominium, and their waiver of their rights of first refusal after determination of fair market value is made." Appellees' Brief, p. 13. As noted in a case cited by Appellees, "counter-letters, as agreements between the parties, must be evaluated on the specific substance of the language therein." *Roy v. Robco, Inc.*, 98-214 (La. App. 5 Cir. 10/4/98), 721 So.2d 45, 47. Likewise, the counterletter's terms are the law between the parties.

Because of the counterletter's plain language, Jeffry did not acquire an interest in Unit B because: (1) the other owners never waived their rights of first refusal, and (2) the unit's fair market value was not determined. Appellees' brief ignores this basic point under Louisiana contract law, apparently because they have no response.

II. The public records doctrine applies and provides that the counterletter had no effect on the Appellees.

Appellees assert that this Court should contravene centuries of Louisiana public records law by arguing the counterletter between Mrs. Strauss and Jeffry did not have to be recorded to be effective against third parties. Appellees' argument is contradicted by their own brief, which recognizes that unrecorded counterletters are effective only between the parties. Appellees' Brief, p. 19 ("an instrument in writing affecting immovable property which is not recorded is null and void except between the parties.").

More importantly, recordation is such a fundamental ***3** requirement for an agreement to affect third parties that "an unrecorded contract affecting immovable property has no effect as to third persons, even when a third person has actual knowledge of that unrecorded contract." *Wede v. Niche Mktg United States*, 2010-0243, *5 (La. 11/30/10); 52 So.3d 60, 63 n.6. Thus, Appellees' position is rejected by clearly defined and long-standing law that unrecorded counterletters have no effects on third parties.

Appellees discuss *Peterson v. Moresi*, 186 So. 737 (La. 1939) and *Roy v. Robco, Inc.*, 98-214 (La. App. 5 Cir. 10/4/98), 721 So.2d 45, [1] in support of their statement that "Louisiana Courts have rejected th[e] argument" that "the transaction between Jon and Jeffry had to be recorded to be effective" as a sale. Appellees' Brief, p. 13. However, Appellees conveniently fail to inform this Court that the counterletters in both *Moresi* and *Roy* were recorded. *Moresi*, 186 So. at 738; *Robco*, 721 So.2d at 46. In addition, both cases involved the enforcement of rights between signatories to the counterletters, not between a signatory and a third party as is demanded in this case. Finally, the recorded counterletters in *Moresi* and *Robco* did not place conditions precedent on the effectiveness of the transactions between the signatories - in contrast, the Strauss counterletter expressly states that "the rights granted in this counter letter are subject to approval of the owners of the other two units in St. Henry condominium, and their waiver of their rights of first refusal after a determination of fair market value is made." R.41.

Appellees complain that the Strausses "cannot use [the Public Records] doctrine defensively." Appellees' Brief, p. 19. But "[t]he public records doctrine is founded upon our public policy and social purpose of assuring stability of land ***4** titles," *Cimarex Energy Co. v. Mauboules*, 09-1170, *18 (La. 4/9/10), 40 So.3d 931, 943, and law applies to all persons dealing with public records no matter who is at bat. Indeed, Appellees' brief relies on the public records doctrine to argue that their right of first refusal is binding on the Strausses precisely because it is in a Declaration that is recorded, regardless of whether it was read by them. R. 197 (citing La. R.S. 9:1122.101 [2] and stating "[i]f a prospective purchaser is so imprudent as to fail to read the Declaration, he is still legally bound by its terms, conditions, restrictions, and regulations upon acquisition of a unit."). Ultimately, the public records doctrine protects title to property rights, not specific persons.

Apparently recognizing their argument is at odds with public records law, Appellees attempt to deny that they are "third parties" to the counterletter by arguing that they are in fact parties to it. Appellees' Brief, p. 20. Appellees cannot explain how they became "parties" to a document: 1) executed between and only between Mrs. Strauss and Jeffry, 2) made years before Appellees purchased their units, and 3) the purpose of which (facilitating a son's **financial** assistance to his **elderly** mother) has nothing to do with them. *See also,* Strausses' Original Brief, p. 11; La. Civ. Code art. 3343. Even if all law and reason is abandoned to assume *arguendo* that Appellees could be "parties" to the counterletter, they would then be bound by its conditions (discussed above) that barred Jeffry from acquiring an interest in Unit B because the other unit owners did not waive their rights of first refusal and an appraisal was not performed.

***5 III. Appellees improperly seek to enlarge the scope of the appeal.**

Appellees improperly seek to overturn a ruling which is not on appeal: the validity of Mrs. Strauss' donation to Susan Strauss. The only notice of appeal in this case was filed by the Strausses, and the only issues presented for review were whether the trial court erred in finding that Jeffry Strauss owned 48.2% of Unit B under the counterletter, and whether that sale was effective as to the Appellees. Strausses' Original Brief, p. 3. Appellees did not appeal or answer the appeal. As nobody appealed the validity of the donation, the validity of the donation is conclusive, as is its conveyance of all of Mrs. Strauss' interest in Unit B. The only issue on appeal is what percentage of the Unit B was "all of her interest" when the donation occurred, which will be determined by whether the holding below erred in finding that Jeffry acquired a 48.2% interest in the unit. *See, Theresa Seafood, Inc. v. Berthelot*, 2009-0814 (La. App. 4 Cir. 3/10/10), 40 So.3d 132, 137 (stating "[t]he record does not show that [Plaintiff] appealed or answered [Defendant's] appeal in this case. This Court is precluded from addressing any claim for modification of a judgment by a party who failed to file an appeal or answer the appeal. Therefore, [Plaintiff's] request for modification of the judgment in its favor cannot be considered.") (internal citations omitted). [3] As a result, Appellees' arguments to set aside the donation should not be heard.

***6** In any event, the donation was valid. Appellees do not attack the form of the donation but, instead, advance an incoherent theory that Jeffry's post-donation letter to his mother acknowledging that the donation annulled any option he had to purchase his mother's property (R. 170) somehow "triggered the ROR, and the ROR trumps the Donation." Appellees' Brief, p. 21. Appellees cite *Minton v. Crawford*, 98-478 (La. App. 3 Cir. 10/7/98), 719 So.2d 743, but it involved a loss of a right of first refusal following a land sale. In this case, there was no sale, and Appellees still have their rights of first refusal. *See* Appellees' Brief, p. 6 (acknowledging that when Mrs. Strauss contemplated divesting herself of Unit B, she first went to Appellees requesting that they waive their rights of first refusal, and that the "waiver request triggered the Declaration's ROFR"). Likewise, Appellees' argument that the donation was a "disguised sale" which triggered the right of first refusal is an improper attempt to appeal the validity of the donation and is made without legal or factual support. [4]

IV. Appellees' personal attacks against the Strauss family are unsupported and irrelevant.

Appellees' brief repeatedly levies disparaging remarks and personal attacks against the Strausses, even including a "conspiracy theory." These statements are offensive, unfounded and irrelevant. [5] An unrecorded counterletter is not the stuff ***7** of conspiracies; counterletters have been recognized as a valid, lawful form of private contract in Louisiana for hundreds of years - with the caveat that they can have no effect on third parties like the Appellees. Furthermore, the Strauss counterletter *protected*, not diminished, the other unit owners' rights of first refusal by preventing Jeffry from acquiring an ownership interest in the unit unless and until the other unit owners waived their rights of first refusal. The counterletter had no nefarious purpose. Instead, it simply allowed Jeffry to help his mother buy a residence while recognizing his right to be reimbursed. There is absolutely nothing inappropriate under Louisiana law about private parties making confidential private contracts between themselves, particularly when personal or family matters are involved. [6]

Appellees ironically reference "unclean hands" and appeal to "equity" to allow them to purchase Unit B at last decade's price. First, equity is not applicable as a matter of law because Louisiana courts can only turn to equitable principles to decide cases in the absence of express law. *Terrebonne Parish Police Jury v. Kelly*, 428 So.2d 1092, 1094 (La. App. 1 Cir. 1983). This case is governed by contract law and the law of recordation. In any event, the Civil Code defines equity as "based on the principles that no one is allowed to take unfair advantage of another and that no one is allowed to enrich himself unjustly at the expense of another." La. Civ. Code art. 2055. It is difficult to understand how equitable principles would disfavor a son's generous private agreement to allow his mother to buy a ***8** residence with his help and provide for him to be reimbursed at his mother's death. On the other hand, Appellees seek to seize upon this private agreement to take unfair advantage of Mrs. Strauss and her family by wresting away the condominium for a fraction of its market value. Appellees' argument is unsupported legally and factually and should be rejected.

Ultimately, this suit begs the question why the Appellees are so intent on turning the 2002 counterletter into a sale. The answer is simple: it is an opportunity to make a profit. Appellees want to acquire all or part of Unit B at a 2002 price and then make a profit by selling the unit at judicial sale for its significantly higher 2013 value. See Appellees' Brief, p. 23. Appellees' suggestion that the right of first refusal is necessary to "provide for a congenial occupation of the Units" is a red herring; the Condominium Declaration provides that their rights of first refusal *do not apply* if the unit is sold at judicial sale (as demanded by Appellees' request for Unit B to be partitioned), and in that event, anyone could buy the unit. R. 20.

V. Conclusion

Appellees' arguments are not supported by law or the record. The judgment below that the counterletter conveyed 48.2% of Unit B to Jeffry Strauss should be reversed and set aside.

Footnotes

1 The Strausses located this case as "*Threeton v. Robco,*" but use "*Roy v. Robco"* for consistency's sake. The final case discussed by Appellants, *Autin v. Commissioner of Internal Revenue,* 109 F.3d 231 (5th Cir. 1997), held that the execution of a counterletter "constituted a complete gift for federal tax purposes." *Id.* at 236. A counterletter's effect on federal tax classifications is simply not pertinent to the effect of this counterletter.

2 Revised Statute 9:1122.101 provides that a "condominium declaration and any instrument by which the condominium regime is altered or terminated shall be effective against third parties when filed for registry in the conveyance records in the parish in which the immovable property is located." (Emphasis added).

3 *See also, e.g., American Sec. Bank v. Estate of Joseph,* 284 So. 2d 94, (La. App. 3 Cir. 1973) (under art. 2133, plaintiff that neither appealed nor answered appeal could not be given relief asked for only in its brief); *Ward v. Schwegmann Giant Super Markets, Inc.,* 538 So. 2d 1051 (La. App. 4 Cir. 1989) (where plaintiff did not appeal or answer defendant's appeal, appellate court precluded by art. 2133 from considering issues asserted in his brief); *Garcia v. Banfield Pet Hosp., Inc.,* 35 So. 3d 261, (La. App. 1 Cir. 2010), *writ denied,* 34 So. 3d 299 (La. 2010) (assignments of error not considered because employer did not appeal trial court judgment and filed no answer in response to a former employee's appeal); *Beebe's on the Lake, LLC v. Walker,* 2013 La. App. LEXIS 766 (La. App. 4 Cir. 4/17/13) (issues raised by landlord not properly before appellate court and not considered because answer to appeal not filed timely). Appellees cite language from *Cimarex Energy Co. v. Mauboules* concerning "unclean hands" in an attempt to resurrect the validity of the donation for appeal. *Cimarex,* which held that an oil company properly invoked a concursus proceeding to determine royalty ownership, has no application to this case, and does not stand for the proposition Appellees try to advance.

4 The term does not appear in the Civil Code, Code of Civil Procedure or Revised Statutes.

5 Appellees' many factual misstatements include that "Mrs. Goodyear hand-delivered a letter to Jon" requesting information about the counterletter (Appellees' Brief, p. 7) and that Mrs. Strauss "ignored" and evaded these letters. In fact, Mrs. Goodyear took a letter to a mailbox at Lambeth House. R. 218-219. Mrs. Strauss did not "ignore" these letters, sent 4 days apart to an **elderly** woman who was in the process of moving into an assisted living facility. That Mrs. Strauss did not immediately receive and respond to these letters is not "unscrupulous" or "evasive," and this characterization is a tragic distortion of the truth.

Appellees accuse the Strausses of "a long-term pattern of evasion and intentional concealment ... done to evade legal obligations to provide a ROFR/ROR." Appellee's Brief, p. 11. The Record does not support Appellees' narcissistic construction of the facts. The counterletter had nothing to do with any unit owners, including Appellees. The counterletter's only purpose was to ensure that Jeffry would be paid back upon his mother's death (R. 135, ¶ 22) by inheriting a 48.2% interest in Unit B with an option to buy the rest subject to other unit owners' rights of first refusal. Appellees learned about Jeffry's connection to Unit B when he *voluntarily* mentioned it to Elizabeth Goodyear. Appellees' Brief, p. 6. And, the Strausses never tried to deprive Appellees of their rights of first refusal - the counterletter explicitly acknowledges the right, and Mrs. Strauss complied with the right by requesting a waiver from Appellees. If this was the Strausses' grand conspiracy to "conceal" the counterletter in order to "evade" the ROFR, it is a poorly-executed conspiracy indeed, since the Strausses *gave* Appellees the counterletter 4 weeks after *telling* Appellees that it existed, (R. 218, ¶ 7; R. 219, ¶ 15) and have consistently honored the very rights of first refusal which Appellees accuse them of trying to evade.

6 For example, Appellee 6126 LLC is characterized in Appellees' brief as the Goodyears, but 6126 LLC has not disclosed any agreements explaining the Goodyears' interest in 6126 LLC.

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